(3)

No. 91-561

In the

Supreme Court of the United States

October Term, 1991

MAHINDER S. UBEROI,
Petitioner,

v.

UNIVERSITY OF COLORADO, a State Institution, WILLIAM McINERNY, JOE ROY, GARY ARAI, JOHN HOLLOWAY, and RICHARD THARP,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

PETITION'S REPLY TO BRIEF IN OPPOSITION

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Respondents' assertion, that except for one issue, petitioner has failed to preserve any other issue for review here, is unfounded

Respondents state that review of judgment and opinion of Court of Appeals involves two questions:

> 1. Whether the Colorado Court of Appeals correctly held that the University of Colorado and its officials acting in their official capacities are not "persons" subject to suit under 42 U.S.C. §1983 in affirming the judgment of the trial court after this Court's intervening decision in Will v. Michigan Department of State police, 491 U.S. 58 (1989)?
>
> 2. Whether Petitioner has adequately preserved any of his other issues for Supreme Court review?

Colorado Court of Appeals did not affirm because petitioner had failed to preserve some issues, but solely because

> [Will], in essence, validated the trial court's original conclusion that subject matter jurisdiction was lacking. Therefore, we agree with defendants that plaintiff's remaining claims are barred. [Emphasis added. Petition at a3, a4.]

Thus, without any analysis, the court held that Will barred 42 U.S.C. §1983 claims for damages against respondents in their official capacities as well as claims for injunctive relief as well as §1983 claims against respondents in their personal capacities, as well as a common law claim of assault and battery against McInerny, which was revived. See petition at 6 and 7 about revival of the common law claim.

Petitioner's reply to respondents' detailed assertions of petitioner's failure to preserve issues is given in the last part of this brief.

Respondents' arguments do not support Court of Appeals conclusory opinion

Is University of Colorado a "local governing body" or an "arm of the state"

for purposes of Eleventh Amendment Immunity relative to §1983 claims

Respondents argue that,

> In any event, if Colorado Supreme Court determined [Uberoi v. University of Colorado, 713 P.2d 894 (Colo. 1986)] that a state university, chartered by the state constitution, is a "local governing body" subject to suit under §1983, then it was in error...
>
> The test whether a governmental entity is an arm of the state, as distinguished from so-called political subdivision such as counties, municipalities, and other "local governing bodies," are: (1) to what extent does the entity, although carrying out a state mission, function with substantial autonomy from the state government, and (2) to what extent is the entity financed independent of the state treasury. See Unified School District No. 480 v. Epperson, 583 F.2d 1118, 1121-1122 (10th Cir. 1978) [Opposition Brief at 13,14.]

Thus, petitioner and respondents agree on the criteria, see petition at 17, to determine whether University of

Colorado may be considered a "local governing body" and a "person" under §1983 and subject to damage suit following Monell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1978). However, opposing sides come to opposite conclusions.

Respondents argue that:

> State universities are generally subject to complete control of and are financed by the state. [Emphasis added. Opposition Brief at 14.]

However, each state university operates under its own peculiar circumstance, state policy and law. Therefore, citations of cases involving other state universities is unavailing here.

Opposition Brief at 16 then cites opinions of various courts on University

of Colorado. In re Macky's Estate, 102 P. 1075, 1081 (Colo. 1909) held that "[Board of Regents] is an agency of the state for the governance of the University [of Colorado]." The court summarized the case as:

> Proceeding for the assessment of an inheritance tax on the estate of Andrew J. Macky, deceased. From an order of the county court declaring certain legacies to the Regents of the State University and to the City and County of Boulder not subject to the tax, reversed on appeal to the district court, the legatees appeal. Reversed and remanded, with direction to enter judgment that the legacies are not subject to tax. Id. at 1075.

The court lumped the University of Colorado with City and County of Boulder and held that as subdivisions of the state they are not subject to state inheritance tax. It did not decide on the extent of control exercised by the

state on City and County of Boulder and the University, both of which are chartered by the state.

Opposition Brief at 16 further cites Rozek v. Topolnicki, 865 F.2d 1154, 1158, (10th Cir. 1989) which held that

> The district court did not err in concluding that...the University of Colorado [is] entitled to Eleventh Amendment Immunity in this case.

Respondents also cite some unpublished opinions of the district court dated 1982, 1983, and 1984. None of these conclusory opinions gives any analysis under the criteria proposed by respondents. All of these opinions were issued before 1990 when Colorado Legislature amended C.R.S. §23-1-104(3), effective July 1, 1990, which frees the

governing boards of all state supported institutions of higher learning, including University of Colorado, from all state control.

> C.R.S. §23-1-104(3). Notwithstanding the provisions of §24-75-102, C.R.S., the governing bodies are authorized to retain all moneys appropriated pursuant to this section and §23-1-118 or otherwise generated, fiscal year to fiscal year.

Moreover under §23-1-104(1)(a) the University gets from the state "annual appropriations as a single line item" which it may use in "manner deemed most appropriate" by it. In 1988-89 only 22.9% of its revenues came from the state treasury. Petition at 19.

Opposition Brief at 15 states:

> Under Colo. Const. Art. VIII, §5, this body corporate [University of Colorado] is under the control of General Assembly.

Section 5(2) states:

> The governing boards of the state institutions of higher education, whether established by this constitution or by law, shall have the general supervision of them respective institutions and exclusive control and direction of funds and appropriations to their respective institutions, unless otherwise provided by law. [Emphasis added.]

The constitution was amended in 1972, effective January 11, 1973 to add "Unless otherwise provided by law" because the University claimed that general laws do not apply to it because of its special status under the constitution. Even so, it prevailed that Colorado Open Meetings does not apply it, Associated Students of University of Colorado v. Regents of University of Colorado, 543 P.2d 59 (Colo. 1975) and that Open Records Act

does not apply it, Uberoi v. University of Colorado, 686 P.2d 785 (Colo. 1984). It claimed that reference to "institution" in definition of "public records" is not specific enough to demonstrate legislative intent to make open records law applicable to the University of Colorado. Even though Art. VIII of Colo. Const. governing the University of Colorado is entitled "State Institutions."

Thus, the courts have held the University of Colorado enjoys substantial independence from the state. In order to show that State Supreme Court was in error in Uberoi, 1986, and that the University is not a "local governing body" under Monell, supra, it is necessary to analyze the actual

operation of the University in the light of criteria set by federal law and proposed here by respondents. This cannot be done by mentioning the University of Colorado in footnote 3 in Will, supra, nor by a conclusory opinion of Colorado Court of Appeals.

The Appeals Court should have remanded the case to trial court to take evidence on the operations of the University, including its financial records to show the percentage of state support and historical record and the recent state law on the extent of state control over the University.

The Appeals Court did not ask to be rebriefed by the parties in the light of Will. It did not even ask for a short supplemental brief after respondent

brought Will to its attention. It simply issued a conclusory opinion.

Opposition Brief at 15 states:

> The Board is represented in law suits by the Attorney General of the State of Colo., see Colo. Rev. Stat. §23-20-110 (1988), and no claim against the University may be settled without the Attorney General's consent. See Colo. Rev. Stat. §24-10-112 (1989).

The Attorney General has discharged his duty under the statutes by designating counsel employed full time by the University as Special Assistant Attorney General and the University is quite independent otherwise. In fact, the University is not represented by the Attorney General, nor by his staff paid from the state fund, nor by any Special Assistant Attorney General.

Petitioner's claim for injunctive relief

Opposition Brief at 17 states:

> Nor do Respondents dispute a suit for injunctive relief may be maintained against a state official in his official capacity under §1983...
>
> Although petitioner attempted to amend his complaint to seek injunctive relief, leave to amend was neither sought nor granted by trial court. Failure to preserve this issue below precludes its consideration by this Court.

The record on appeal, Vol. I, p. 27, and again at p. 47, shows that on August 15, 1983, petitioner filed motion to amend the complaint by interlineation, and Vol. I pp. 28, 29 show the amendment by interlineation to the complaint which seeks injunctive relief.

Claims against respondents in their personal capacities

Opposition Brief at 17 states:

> Respondents do not deny that the Court's decision in Will concerned only suits against state officials in their official capacities, and that suits under §1983 may still be maintained against State Officials in personal capacities. See Kentucky v. Graham, 473 U.S. 159(1985).
>
> The record shows that this issue [of personal capacity claims] was never raised by petitioner in his petition for rehearing in Colorado Court of Appeals, or in his petition for writ of certiorari in the Colorado Supreme Court. Hence, this issue has not been preserved for Supreme Court review. Id. at 18.

In the Colorado Court of Appeals, petitioner sought statutory review of trial court judgment. The Court of Appeals affirmed summary judgment for all defendants on all claims, including personal capacity claims because under Will trial court has no subject matter jurisdiction of any claim. Petition for

rehearing stated that Will concerned only claims against some respondents in their official capacities. The petition repeatedly stated that the court considers the issues raised on appeal which are not barred by Will.

> This court has refused to rule on several meritorious issues raised on appeal... . [Petition for rehearing in Colorado Ct. of Appeals at 1.]
>
> The court should grant rehearing on its judgment...and rule on the issues raised on appeal. Id at 6.

Moreover, the petition sets forth in detail that the court should conduct statutory review of trial court's dispositions of personal capacity §1983 suit against respondent McInerny.

> Trial court dismissed slander, assault and battery claims against McInerny for Uberoi's failure to give notice under [Colorado] Governmental Immunity Act. Supreme

> Court affirmed. On remand, trial court ruled that it was a "fight between two private citizens," V.2, p. 248 [petition at a10] and granted summary judgment for McInerny on [§1983] civil rights claims. Thus trial court reacquired jurisdiction over the common law claims of assault and battery since McInerny, acting as a private citizen, the protection of Governmental Immunity. Id. 1,2.

In the petition for writ of certiorari in Colo. Supreme Court, petitioner sought review of Colorado Court of Appeals' failure to conduct statutory review of trial court's disposition of §1983 personal capacity claims. However, petitioner is not seeking review of proceedings in the state supreme court and respondents' arguments about these proceedings are irrelevant here.

Federal law governs attorney fees for §1983 claims in state court

Opposition Brief at 19 states:

> Petitioner asserts that Colo. Rev. Stat. §13-17-101 does not apply to awards of attorney fees for... litigation under §1983. Once again this issue was neither passed on by Colorado Court of Appeals nor raised in his petition for rehearing in that court of in his petition for writ of certiorari to the Colorado Supreme Court.

Petitioner raised this issue in Colorado Court of Appeals which resolved this and all other issues with the conclusory opinion that Will, supra, deprived trial court of subject matter jurisdiction of all claims.,

Constitutionality of some state statutes

Opposition Brief at 21 states:

> Petitioner's challenge to the constitutionality of Colo. Rev. Stat. §18-9-109(1980) was not raised in the trial court; his challenge to the constitutionality of Colo. Rev. Stat. §13-17-101 et seq. (1987) and Colo. Rev. Civ. P. 11 was raised neither in the trial

court nor in the Colorado Court of Appeals.

The record on appeal, Vol. II, pp. 318, 319, and 325 shows that the constitutionality of §18-9-109(1980) was raised in the trial court; Vol. III, p. 402, shows that the constitutionality of §13-17-101 et seq., and Colo. R. Civ. P. 11 was raised in the trial court. The list of issues raised and the body of petitioner's brief in Colorado Court of Appeals show that these issues were raised there and/or are encompassed in the issues raised there.

Conclusion

In light of inability of respondents to face the issues presented in the petition without grossly distorting the record below, the need

for plenary review of the action below is indisputable; indeed, petitioner suggests that summary reversal is now in order.

Respectfully submitted,

By Mahinder S. Uberoi
petitioner, pro se